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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-538

MAMMOTH BULK CARRIERS, LTD.,
Petitioner,

vs.

JAMES D. BACHTEL, DONNA BACHTEL,
and TWIN HARBOR STEVEDORING CO.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the
United States Court of Appeals
for the Ninth Circuit

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SUBJECT INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes and regulations involved	2
Statement of the case	4
Reasons for granting the writ	7
Background of the question	7
The conflicts as to the standard for imposing a duty	9
The conflicts as to the use against the shipowner of the regulations directed at the stevedore	11
Importance of the questions	12
Related cases	15
Conclusion	16

TABLE OF AUTHORITIES CITED

Cases

Page

Anderson v. Iceland Steamship Co., 585 F.2d 1142 (1st Cir. 1978) 10

Anuszewski v. Dynamic Mariners Corp., 540 F.2d 757, 1976 A.M.C. 2048 (4th Cir. 1976) 10

Boleski v. American Export Lines, Inc., 385 F.2d 69, 1967 A.M.C. 2069 (4th Cir. 1967) 7

Bossard v. Exxon Corp., 559 F.2d 1040 (5th Cir. 1977) 12

Briley v. Charente Steamship Co., 572 F.2d 498 (5th Cir. 1978) 10

Brown v. Mitsubishi Shintaku Ginko, 550 F.2d 331, 1977 A.M.C. 989 (5th Cir. 1977) 10, 12

Canizzo v. Farrell Lines, Inc., 579 F.2d 682, 1978 A.M.C. 1920 (2d Cir. 1978) 10

Chavis v. Finnlines Ltd., 576 F.2d 1072 (4th Cir. 1978) ..7, 10, 12

Clemons v. Mitsui O.S.K. Lines, Ltd., 596 F.2d 746, 1979 A.M.C. 999 (7th Cir. 1979) 10, 12

Cox v. Flota Mercante Grancolombiana, S.A., 577 F.2d 798, 1978 A.M.C. 1277 (2d Cir. 1978) 10

Edmonds v. Compagnie Generale Transatlantique, No. 78-479 (June 2, 1979) 6, 14, 15, 16

Gay v. Ocean Transport & Trading, Ltd., 546 F.2d 1233, 1977 A.M.C. 996 (5th Cir. 1977) 10, 11, 12

Griffith v. Wheeling-Pittsburgh Steel Corp., 3d Cir. Nos. 78-2159, 78-2160 and 78-2161 (August 24, 1979) 14

Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282, 1952 A.M.C. 1 (1952) 14

Hickman v. Jugoslavenska Linijska Plovidba Rijeka, Zvir, 570 F.2d 449, 1978 A.M.C. 355 (2d Cir. 1978) 10

Hurst v. Triad Shipping Co., 554 F.2d 1237, 1977 A.M.C. 1625 (3d Cir. 1977) 10

Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315, 1964 A.M.C. 1075 (1964) 8

Lawson v. United States, 9th Cir. No. 77-2510 (August 21, 1979) 13

Lopez v. A/S D/S Svendborg, 581 F.2d 319, 1978 A.M.C. 1655 (2d Cir. 1978) 10

Table of Authorities Cited

Cases

Page

Lubrano v. Royal Netherlands Steamship Co., 572 F.2d 364, 1978 A.M.C. 826 (2d Cir. 1978) 10, 12

Marant v. Farrell Lines, Inc., 550 F.2d 142, 1977 A.M.C. 267 (3d Cir. 1977) 12

Matthews v. Ernst Russ Steamship Co., 7th Cir. No. 78-2547 (August 20, 1979) 14, 16

Munoz v. Flota Merchante Grancolombiana, 553 F.2d 837, 1977 A.M.C. 843 (2d Cir. 1977) 10

Napoli v. Hellenic Lines, Ltd., 536 F.2d 505, 1976 A.M.C. 551 (2d Cir. 1976) 10

Prohoroff v. Kawasaki Kisen Kaisha, Ltd., 90 Cal.App.3d 640, 153 Cal.Rptr. 287 (1979) 9

Provenza v. American Export Lines, Inc., 324 F.2d 660, 1964 A.M.C. 2279 (4th Cir. 1963) 6, 7

Rich v. United States Lines, Inc., 596 F.2d 541 (3d Cir. 1979) 10, 12

Riddle v. Exxon Transportation Co., 563 F.2d 1103, 1978 A.M.C. 741 (4th Cir. 1977) 10

Ruffino v. Scindia Steam Navigation Co., 559 F.2d 861, 1977 A.M.C. 1289 (2d Cir. 1977) 10

Samuels v. Empresa Lineas Maritimas Argentinas, 573 F.2d 884, 1978 A.M.C. 1647 (5th Cir. 1978) 10

Santos v. Scindia Steam Navigation Co., 598 F.2d 480 (9th Cir. 1979) 5, 6, 9, 10, 13, 14

Scindia Steam Navigation Co., Ltd., Petitioner v. Lauro de los Santos and Seattle Stevedore Co., Respondents, No. 79-512 16

Wescott v. Impresas Armadoras, S.A., 564 F.2d 875, 1979 A.M.C. 930 (9th Cir. 1977) 10

Wiles v. Delta Steamship Lines, Inc., 574 F.2d 1338, 1978 A.M.C. 2427 (5th Cir. 1978) 10

Statutes

28 U.S.C. section 1254(1) 2

Longshoremen's and Harbor Workers' Compensation Act:

33 U.S.C. Section 905(b) 2, 5, 7, 8, 12, 14

Section 941(a) 3, 11

Table of Authorities Cited

Regulations

	Page
Safety and Health Regulations for Longshoring:	
29 C.F.R. Part 1918	6
Section 1918.2	4, 11
Section 1918.32(b)	4

Miscellaneous

Restatement (Second) of Torts:	
Section 343	10
Section 343A	10
Section 409	10
Section 414	10
H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., reprinted in [1972] U.S. Code Cong. & Ad. News 4698	8, 11
S. Rep. 92-1125, 92d Cong., 2d Sess.	8, 11

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Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the
United States Court of Appeals
for the Ninth Circuit

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in case No. 77-3645, entered on August 20, 1979.

OPINIONS BELOW

There was no opinion in the district court. The opinion of the United States Court of Appeals for the Ninth Circuit is not yet reported but is set forth in the Appendix, pages A-1 through A-22.

JURISDICTION

On August 20, 1979, the Court of Appeals entered its judgment affirming the judgment of the district court. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

QUESTIONS PRESENTED

The questions presented are:

1. Whether a shipowner is required to countermand a stevedore contractor's informed decision regarding the safety of work methods and equipment in order to avoid liability to longshoremen who are employees of the stevedore company under the negligence standard of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b)?

2. Whether the stevedore contractor's violation of one of the Safety and Health Regulations for Longshoring, which explicitly place responsibility for compliance upon the stevedore contractor and provide that they shall not place "additional responsibilities or duties on owners", may be treated as evidence that a shipowner was negligent under the 1972 Amendments?

STATUTES AND REGULATIONS INVOLVED

Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972:

33 U.S.C. § 905(b) (added in 1972):

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against

such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

33 U.S.C. § 941(a) (added in 1958):

Every employer shall furnish and maintain employment and places of employment which shall be reasonably safe for his employees in all employments covered by this chapter and shall install, furnish, maintain, and use such devices and safeguards with particular reference to equipment used by and working conditions established by such employers as the Secretary may determine by regulation or order to be reasonably necessary to protect the life, health, and safety of such employees, and to render safe such employment and places of employment, and to prevent injury to his employees....

Safety and Health Regulations for Longshoring:

29 C.F.R. § 1918.2:

> (a) The responsibility for compliance with the regulations of this part is placed upon "employers" as defined in § 1918.3(c).
>
> (b) It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers, nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom.

29 C.F.R. § 1918.32(b):

> When an edge of a hatch section or of stowed cargo more than 8 feet high is so exposed that it presents a danger of an employee falling, the edge shall be guarded by a safety net [of] adequate strength to prevent injury to a falling employee, or by other means providing equal protection under the existing circumstances.

STATEMENT OF THE CASE

James Bachtel, who was a longshoreman employed by Twin Harbor Stevedoring Company, and his wife, Donna Bachtel, brought this action within the diversity jurisdiction of the United States District Court for the Western District of Washington, seeking damages for injuries and loss of consortium caused when Bachtel fell from a load of logs aboard a vessel owned by petitioner. A jury awarded the Bachtels $266,331.75 after reduction of their damages for 25% fault ascribed to Bachtel, and the trial

court denied the shipowner's motion for a judgment notwithstanding the verdict. The Court of Appeals for the Ninth Circuit affirmed, deciding that its recent opinion in *Santos v. Scindia Steam Navigation Co.*, 598 F.2d 480 (9th Cir. 1979) (Petition for Certiorari filed September 26, 1979) dictated denial of the shipowner's action for judgment n.o.v. and that the trial court had not erred in instructing that the stevedore's violation of the Safety and Health Regulations for Longshoring could be treated as evidence of the shipowner's negligence under 33 U.S.C. section 905(b).[1]

When reviewing the sufficiency of the evidence, the Court of Appeals did not indicate that the jury could have found that there was anything unusual about the ship or the cargo or the manner of either loading or lashing the cargo. Rather the court found the ship to be "a bulk log carrier in the Pacific trade, . . . similar to many other log carriers in design and construction." The court also stated: "The accident occurred in Aberdeen, Washington, a major log exporting port. Ninety percent of the stevedoring work in that area is the loading of log ships." (Appendix, pp. A-2, A-3.) Nor did the court state that there had been any act of the shipowner's agents which could have been found to

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[1]Twin Harbor Stevedoring Company intervened in the trial court to assert its "lien". An issue arose between the Bachtels and Twin Harbor regarding allocation of attorney's fees. A separate appeal (No. 77-3043) involving that issue was filed and consolidated with this case in the Court of Appeals (Appendix, p. A-2). On August 31, 1979 Twin Harbor petitioned for a rehearing in that action, and the court has invited responses, due September 27, 1979. The issues of the standard of care and applicability of the safety regulations are not involved in any way in that rehearing, nor would any decision alter the fact or amount of the judgment against Mammoth in this case.

have immediately caused Bachtel to fall. Of the immediate involvement of the crew, all the Court of Appeals noted was that the lashing was done "with participation by" the crew (Appendix, p. A-11). Rather, the court held that because danger is inherent in the lashing of a deck load of logs and because the shipowner knew both of the danger (because it operated the ship as a log carrier) and the lashing ("dictated by the vessel's design and equipment"), the shipowner had been negligent (Appendix, p. A-11). Although the Court of Appeals found it significant that the shipowner knew the stevedore company could not rig safety lines or nets, it ignored uncontradicted evidence that the stevedore company had available at the dock safety harnesses and ropes which would have prevented the accident but did not choose to use them. The primary authority cited was *Santos v. Scindia Steam Navigation Co.*, 598 F.2d 480 (9th Cir. 1979) (Petition for Certiorari filed September 26, 1979), but the court also made curious use of the recent decision of this Court in *Edmonds v. Compagnie Generale Transatlantique,* No. 78-479 (June 27, 1979).

On the issue of the jury instruction the court held that the Safety and Health Regulations for Longshoring, 29 C.F.R. Part 1918, "are binding on the shipowner where he knew or should have known of a violation of the safety regulations" (Appendix, p. A-17). To reach this conclusion the court was required to reject the authority of every court of appeals decision which had ever dealt with the question, and the court attempted to minimize the extent of the conflict by noting that it was disagreeing with "the majority of the courts that have considered the regulations" (Appendix, p. A-14). Moreover, the court was required to

rely on the Fourth Circuit cases of *Provenza v. American Export Lines, Inc.*, 324 F.2d 660, 1964 A.M.C. 2279 (4th Cir. 1963), and *Boleski v. American Export Lines, Inc.*, 385 F.2d 69, 1967 A.M.C. 2069 (4th Cir. 1967), although both of those cases have been held by the court which decided them not to be applicable to cases arising, as this one does, under the 1972 Amendments. *Chavis v. Finnlines Ltd.*, 576 F.2d 1072, 1082 (4th Cir. 1978).

REASONS FOR GRANTING THE WRIT

The Writ of Certiorari should be granted because the Court of Appeals has in this case:

1. Rendered a decision in conflict, on one of its two major issues, with decisions on the same matter of six other Courts of Appeals, those of the First, Second, Third, Fourth, Fifth and Seventh Circuits, and on the other issue with decisions of four Courts of Appeals, those of the Third, Fourth, Fifth and Seventh Circuits, and

2. Decided important questions of federal law which have not been, but should be, settled by this Court.

Background of the Question

The issues here arise under 33 U.S.C. section 905(b), a subsection enacted in 1972 as one of the major reforms of the Longshoremen's and Harbor Workers' Compensation Act at that time. By its provisions Congress eliminated unseaworthiness as a ground of recovery by the longshoreman against the vessel and restricted his recovery to an action for negligence, under new conditions furthering the policy of the Act. The legislative history, supported by court decisions since, shows that the new action for negli-

gence is to be uniform throughout the country[2] but not based upon maritime doctrines.[3] Rather it is to be based upon traditional standards ashore so as to "place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore".[4] The announced policy of the changes made was to establish a fully adequate system of compensation benefits[5] and thus assure that the employer (who has ordinarily the best opportunity to promote safety)[6] "bears the cost of unsafe conditions . . . [so as] to strengthen the employer's incentive to provide the fullest measure of on-the-job safety"[7] and reduce reliance upon suits against vessels.[8] More particularly it was stated that "a vessel shall not be liable . . . for the manner or method in which stevedores or employees of stevedores . . . perform their work."[9]

When longshoremen's negligence cases began to arise under section 905(b), there was no doubt, of course, that the shipowner would be liable for active negligent behavior toward the longshoreman, and few cases involving such con-

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[2]S. Rep. 92-1125, 92d Cong., 2d Sess. 12; H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 4698, 4705.

[3]S. Rep., *supra* note 2, at 10; H.R. Rep., *supra* note 2, at 4703.

[4]*Ibid;* "The Committee intends . . . that the vessel shall not be liable . . . unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances." S. Rep., *supra* note 2, at 11; H.R. Rep., *supra* note 2, at 4704.

[5]S. Rep., *supra* note 2, at 2, 5; H.R. Rep., *supra* note 2, at 4699, 4700.

[6]Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315, 1964 A.M.C. 1075 (1964).

[7]S. Rep., *supra* note 2, at 2; H.R. Rep., *supra* note 2, at 4699.

[8]*See* S. Rep., *supra* note 2, at 4.

[9]S. Rep., *supra* note 2, at 10; H.R. Rep., *supra* note 2, at 4703.

duct have reached the appellate courts.[10] The cases the appellate courts were faced with were of a different character, involving conditions of equipment or of working areas voluntarily accepted by the stevedores or operating methods used by them, as contrasted with active negligent behavior of the vessels. The courts, in order to effectuate the clear policy of the Amendments, began a quest to find in traditional non-maritime sources a suitable definition of the limited circumstances, if any, in which the shipowner should shoulder burdens of preparation, supervision and oversight for the safety of the longshoreman working aboard under the actual control of his stevedore employer. It is that quest which the Court will see illustrated in the decisions listed below, with which the present case is in conflict.

The Conflicts as to the Standard for Imposing a Duty

The decision below follows the Ninth Circuit's recent opinion in *Santos v. Scindia Steam Navigation Co.*, 598 F.2d 480 (9th Cir. May 1, 1979) (Petition for Certiorari filed September 26, 1979), and is therefore in conflict with decisions of six other circuits. *Santos* purported to establish the content of negligence actions against the shipowner and abandoned all limitations on the shipowner's duty to longshoremen.[11]

The *Santos* opinion rejected three existing lines of cases, each of which had applied limits on the shipowner's duty to take affirmative action for the safety of the employees

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[10]For a case of active negligence, *see* Prohoroff v. Kawasaki Kisen Kaisha, Ltd., 90 Cal. App. 3d 640, 153 Cal. Rptr. 287 (1979), where the crew put grease on the deck.

[11]598 F. 2d at 486 n.4, and 490 n.7.

of the stevedore contractor.[12] Some cases had relied on sections 343 and 343A of the Restatement (Second) of Torts,[13] some on the relinquishment of control of the situation to the stevedore contractor,[14] and others on sections 409 and 414 of the Restatement, limiting the duties imposed on those who employ independent contractors.[15] The nature and significance of the Ninth Circuit's departure from all prior authority is elaborated in the Petition for Certiorari in the *Santos* case, and it suffices to say here that by following *Santos* the court below continued to take a position

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[12]*Ibid.*

[13]Clemons v. Mitsui O.S.K. Lines, Ltd., 596 F.2d 746, 1979 A.M.C. 999 (7th Cir. 1979); Lopez v. A/S D/S Svendborg, 581 F.2d 319, 1978 A.M.C. 1655 (2d Cir. 1978); Canizzo v. Farrell Lines, Inc., 579 F.2d 682, 1978 A.M.C. 1920 (2d Cir. 1978); Lubrano v. Royal Netherlands Steamship Co., 572 F.2d 364, 1978 A.M.C. 826 (2d Cir. 1978); Hickman v. Jugoslavenska Linijska Plovidba Rijeka, Zvir, 570 F.2d 449, 1978 A.M.C. 355 (2d Cir. 1978); Ruffino v. Scindia Steam Navigation Co., 559 F.2d 861, 1977 A.M.C. 1289 (2d Cir. 1977); Napoli v. Hellenic Lines, Ltd., 536 F.2d 505, 1976 A.M.C. 551 (2d Cir. 1976); Chavis v. Finnlines Ltd., 576 F.2d 1072 (4th Cir. 1978); Riddle v. Exxon Transportation Co., 563 F.2d 1103, 1978 A.M.C. 741 (4th Cir. 1977); Anuszewski v. Dynamic Mariners Corp., 540 F.2d 757, 1976 A.M.C. 2048 (4th Cir. 1976); Samuels v. Empresa Lineas Maritimas Argentinas, 573 F.2d 884, 1978 A.M.C. 1647 (5th Cir. 1978); Wiles v. Delta Steamship Lines, Inc., 574 F.2d 1338, 1978 A.M.C. 2427 (5th Cir. 1978); Brown v. Mitsubishi Shintaku Ginko, 550 F.2d 331, 1977 A.M.C. 989 (5th Cir. 1977); Gay v. Ocean Transport & Trading, Ltd., 546 F.2d 1233, 1977 A.M.C. 996 (5th Cir. 1977).

[14]Cox v. Flota Mercante Grancolombiana, S.A., 577 F.2d 798, 1978 A.M.C. 1277 (2d Cir. 1978); Hickman v. Jugoslavenska Linijska Plovidba Rijeka, Zvir, 570 F.2d 449, 1978 A.M.C. 355 (2d Cir. 1978); Hurst v. Triad Shipping Co., 554 F.2d 1237, 1977 A.M.C. 1625 (3d Cir. 1977); Munoz v. Flota Merchante Grancolombiana, 553 F.2d 837, 1977 A.M.C. 843 (2d Cir. 1977); Briley v. Charente Steamship Co., 572 F.2d 498 (5th Cir. 1978); Wescott v. Impresas Armadoras, S.A., 564 F.2d 875, 1979 A.M.C. 930 (9th Cir. 1977).

[15]Rich v. United States Lines, Inc., 596 F.2d 541 (3d Cir. 1979); Hurst v. Triad Shipping Co., *supra* note 14; Anderson v. Iceland Steamship Co., 585 F.2d 1142 (1st Cir. 1978); Ruffino v. Scindia Steam Navigation Co., *supra* note 13.

in conflict with the cases cited in the foregoing footnotes and again imposed the duty on the shipowner to take affirmative action to oversee the safe performance of work committed to the control of an expert and experienced stevedore contractor.

The Conflicts as to the Use Against the Shipowner of the Regulations Directed at the Stevedore

The court below decided a second question relating to the standards by which a shipowner may be held liable to a longshoreman, and once again parted company with a complete and substantial body of law from other circuits. The court first approved a jury instruction setting forth plaintiff's contention that the shipowner had violated the Safety and Health Regulations for Longshoring and then also approved an instruction that the jury could consider the existence of a condition violating the regulations as evidence of the shipowner's negligence. The statute authorizing the regulations imposes a duty to comply only upon the employer, and the regulations themselves make it explicit that the duty is imposed only upon the stevedore contractor and not on the shipowner. 3 3U.S.C. § 941(a); 29 C.F.R. § 1918.2. The use of a breach of Regulations in this way against the shipowner has the effect of imposing upon the owner the forbidden burden[16] of vicarious liability. The

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[16]"[A] vessel shall not be liable in damages for acts or omissions of stevedores or employees of stevedores, . . . for the manner or method in which stevedores or employees of stevedores . . . perform their work, . . . for gear or equipment of stevedores . . . , or for other categories of unseaworthiness . . . ." S. Rep., *supra* note 2, at 10; H.R. Rep., *supra* note 2, at 4703-04. The Fifth Circuit has held that an argument based upon a violation of the Regulations "is, in effect, that the vessel has a non-delegable duty to provide a longshoreman with a safe place to work." Gay v. Ocean Transport & Trading, Ltd., 546 F.2d at 1239, 1977 A.M.C. at 1004.

Courts of Appeals of the Third, Fourth, Fifth and Seventh Circuits (every Court of Appeals which had discussed the issue) had concluded that a violation of the regulations was not evidence of negligence on the part of the shipowner.[17]

Importance of the Questions

The questions are important first because of their nature. It is clear from the history that Congress intended a major reform by the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act. Its history also indicates a number of policy considerations to be given effect in the Act, such as increased reliance upon the predictability, regularity and adequacy of compensation benefits, the promotion of safety and the reduction of economic loss through legal proceeding. To describe the longshoreman's new and more limited rights against the vessel, the new subsection 905(b) provided but a single word of substance, "negligence", a term which has always been highly variable in content according to the circumstances. Thoughtful exploration and interpretation of its substance are needed if the section is to be given shape to implement the important policies of the Act. Moreover, the effect of an interpretation of the Act which imposes an easy test, or none at all, for a duty of supervision upon the shipowner is grossly aggravated if safety regulations can be

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[17]Rich v. United States Lines, Inc., 596 F.2d 541 (3d Cir. 1979); Chavis v. Finnlines Ltd., 576 F.2d 1072 (4th Cir. 1978); Bossard v. Exxon Corp., 559 F.2d 1040 (5th Cir. 1977); Brown v. Mitsubishi Shintaku Ginko, 550 F.2d 331, 1977 A.M.C. 989 (5th Cir. 1977); Marant v. Farrell Lines, Inc., 550 F.2d 142, 1977 A.M.C. 267 (3d Cir. 1977); Gay v. Ocean Transport & Trading, Ltd., 546 F.2d 1233, 1977 A.M.C. 996 (5th Cir. 1977); *see also*, Clemons v. Mitsui O.S.K. Lines, Ltd., 596 F.2d 746, 1979 A.M.C. 999 (7th Cir. 1979) (dictum); Lubrano v. Royal Netherlands Steamship Co., 572 F.2d 364, 372, 1978 A.M.C. 826, 841 (2d Cir. 1978) (Moore, J., dissenting).

introduced against him which were written explicitly for exclusive use against the stevedore employer. Such use of the regulations issued under the Act is vitally related to the policy of the 1972 Amendments.

The questions presented are important also because of the frequency with which they arise. The history of longshore injury cases in this Court and the number of them to be readily found in the law reports will remind the Court that longshoremen's suits against the shipowner are potentially, and actually, numerous. The numerous appellate court decisions cited in footnotes to the text above, concerning the question of duty presented in this case, should go far to establish its importance. If the appellate decisions on the use of the Safety and Health Regulations for Longshoring are fewer, it is because the question appeared settled until the opinion below in this case. The regulations are detailed and the potential for their use against the shipowner lurks in most of the cases.

The questions are important for consideration by the Court at this time because of the sudden appearance of the same new doctrines embraced by the lower court in other cases in the same and other courts. The doctrine of the opinion below with respect to the shipowner's duty originated with another panel of the same court, in *Santos v. Scindia Steam Navigation Co.*, 598 F.2d 480 (9th Cir. 1979), and both it and the newly announced doctrine as to the use of the regulations were cited in *Lawson v. United States*, 9th Cir. No. 77-2510, decided August 21, 1979, to produce results which, like those in the *Santos* case and this case, could not have been reached under prior decisions

of the same or other courts of appeals. The doctrine of the *Santos* case has been cited and evidently followed also in *Matthews v. Ernst Russ Steamship Co.,* 7th Cir. No. 78-2547, decided August 20, 1979, and more recently again cited and relied on in *Griffith v. Wheeling-Pittsburgh Steel Corp.,* 3d Cir. Nos. 78-2159, 78-2160 and 78-2161, decided August 24, 1979.

The importance of properly defining the scope of the shipowner's duty to longshoremen is magnified by the decision of this Court in *Edmonds v. Compagnie Generale Transatlantique,* No. 78-479 (June 27, 1979), in which a Petition for Rehearing is before the Court and a motion to consider that petition together with this Petition for Certiorari has been filed. *Edmonds* presents the question whether a shipowner, responsible for only 20% of the fault, is liable to the longshoreman for 90% of the damages where the longshoreman was 10% at fault and the stevedore company 70%. The effect of the adoption of the virtually unlimited scope of a shipowner's duty in *Santos* must be evaluated in the light of whether the defendant found liable will be able to shift the burden to the party actually responsible. This Court long ago foreclosed contribution between the shipowner and the stevedore employer. *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.,* 342 U.S. 282, 1952 A.M.C. 1 (1952). The 1972 Amendments themselves forbid indemnity from the stevedore employer. "[T]he employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void."[18]

[18] 33 U.S.C. § 905(b).

If this Court is to continue to hold, as it did in its initial decision in *Edmonds,* that the shipowner is liable for all the plaintiff's damages when it is negligent at all, then a decision vastly increasing the scope of the shipowner's duty has a dramatic effect on shipowners, stevedore companies, and the achievement of the purposes of the 1972 Amendments. And it is ironic and unfitting that such a decision should cite the *Edmonds* opinion in support of its conclusions on the duty of the shipowner.[19] *Edmonds* did not decide any of the issues raised here, but nevertheless is seemingly used in the opinion below to support the conclusion that the primary and active negligence of the stevedore is not to be taken into account in determining whether the shipowner had a duty to prevent the stevedore from breaching its duty to the longshoremen.

If the shipowner is to be held virtually vicariously liable for a failure to supervise the independent stevedore contractor and is to be held so liable without the possibility of relief by way of contribution, indemnity or reduction of damages for the concurrent fault of others, and then, moreover, is to be held liable with the assistance of regulations directed only at the stevedore contractor, drastic burdens have indeed been imposed on the shipowner. Such holdings call for careful scrutiny by this Court to determine whether the goals of the 1972 Amendments have been implemented or frustrated.

RELATED CASES

The question of duty raised by this case is the same question raised in the Petition for Certiorari filed in

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[19]Appendix, pp. A-11, A-12.

Scindia Steam Navigation Co., Ltd., Petitioner v. Lauro de los Santos and Seattle Stevedore Co., Respondents, No. 79-512, and expected to be raised in *Matthews v. Ernst Russ Steamship Co.,* in which it is expected that a petition for certiorari will shortly be filed. The question is also intimately related, as shown above, to the question arising under the same statute in *Edmonds v. Compagnie Generale Transatlantique,* No. 78-479, in which attention has been called to the question by Motion to Defer Ruling on Petition for Rehearing.

CONCLUSION

For the foregoing reasons, we submit that this Court should grant a Writ of Certiorari to review the decision of the Court of Appeals and should consolidate the case for hearing with other cases in which petitions for writs of certiorari are filed raising the same question of duty and should hear all such cases in conjunction with the rehearing of *Edmonds v. Compagnie Generale Transatlantique,* No. 78-479.

Respectfully submitted,

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Appendix A

APPENDIX

Page

A. Opinion of the Court of Appeals A-1

Appendix A

United States Court of Appeals
Ninth Circuit

James D. Bachtel and Donna Bachtel, Plaintiffs-Appellees, vs. Mammoth Bulk Carriers, Ltd., Defendant-Appellant. Twin Harbor Stevedoring Co., Intervenor.	No. 77-3645
James D. Bachtel and Donna Bachtel, Plaintiffs-Appellants, vs. Mammoth Bulk Carriers, Ltd., Defendant-Appellee. Twin Harbor Stevedoring Co., Intervenor.	No. 77-3043

[August 20, 1979]

Appeal from the United States District Court
Western District of Washington

OPINION

Before: KILKENNY and SNEED, Circuit Judges, and WATERS, District Judge.*

KILKENNY, Circuit Judge:

Mammoth Bulk Carriers [Mammoth] appeals from a judgment entered in an action prosecuted by appellee James D. Bachtel and his wife for personal injuries sustained by him when he fell to the dock from a logload on the deck of the M/S MAMMOTH FIR, a vessel owned by Mammoth. Bachtel was employed as a longshoreman by Twin Harbor Stevedoring Co., a stevedore engaged in loading logs on board the vessel. After a trial by jury, a judgment was entered in favor of the Bachtels. After verdict, the stevedore company intervened pursuant to 33 U.S.C. § 933 and asserted a lien against the recovery in the amount of the worker compensation benefits it had paid. The Bachtels moved for a pro-rata contribution of attorney fees from the intervenor. The district court denied the motion. The Bachtels appeal from this denial. The parties stipulated that the two appeals should be consolidated for all permissible purposes under FRAP 3 (b).

OUTLINE OF FACTS

The MAMMOTH FIR, a bulk log carrier in the Pacific trade, is similar to many other log carriers in design and construction. It has five hatches, all forward of the house. It was manned by a Korean crew. The accident occurred in Aberdeen, Washington, a major log exporting port. Ninety percent of the stevedoring work in that area is the

*The Honorable Laughlin E. Waters, United States District Judge for the Central District of California, sitting by designation.

loading of log ships. The MAMMOTH FIR was moored in a berth and at the time of the accident was fully loaded. The lashing of the deck cargo of logs was the only work remaining to be done by the stevedore.

The deck load of logs was contained within steel stanchions along both sides of the vessel. The stanchions rose 20 feet from the deck and the logs rose to within a foot or two from the top of the stanchions. The load was "trimmed" to reach a height approaching 30 feet at the centerline of the ship. The deck load was to be secured with wire [cable] ropes, assisted by heavy chains. Each wire rope and chain was shackled at the lower end to a pad eye on the deck. The ropes were laid over the top of the logs from both sides of the ship, about six feet apart, and tightened by "lacing" them together at the peak or top of the load. The chains were then lifted by a winch from both sides of the ship and strung to the peak of the load to be straightened and freed by longshoremen of any twists, each chain to be secured to its opposing chain by a turn buckle. The work of straightening the chain is commonly known as "pulling."

The accident occurred while Bachtel, in his employment as a longshoreman, was helping another longshoreman pull a chain atop the starboard side of the deck load at the number two hatch.[1] While Bachtel and his co-worker were taking the twists out of the chains, Bachtel fell some 30 feet to the dock below. There is some confusion as to the manner in which he actually fell, but there is no question that he was on the top starboard side of the deck load of logs when he started his fall and he was seriously injured.

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[1]See Appendix A.

PROCEDURAL BACKGROUND

Briefly stated, the Bachtels charged Mammoth with negligence in the following particulars:

(1) Failing to provide a means of erecting a safety line or safety net at the edge of the loaded deck when it knew or in the exercise of reasonable care should have known that longshoremen would be required to work at or near the edge of the deck load and thereby be exposed to a high risk of falling.

(2) Permitting the loading of logs on its deck above the level of the stanchions when it knew or in the exercise of reasonable care should have known that safety lines or safety nets would not be rigged to minimize the risk of longshoremen personnel falling to the dock below.

(3) Directing the design of the logload on its deck at levels which created an unreasonable risk of harm to longshore personnel without providing the means for erecting safety lines or nets or other equipment to minimize such risk.

(4) Failing to require the stevedore to take precautions to prevent the risk of falling when Mammoth knew that the contracted work created a risk of harm by falling, this contention being based on the land based standard of care imposed on contractors under Restatement of Torts (Second).

(5) Violating OSHA's Safety and Health Regulations for longshoring, 29 C.F.R. § 1918.32 (b).

At the close of the Bachtels' case, Mammoth moved for a directed verdict. This motion was denied and Mammoth

went forward with its case. At the close of the evidence and before submission to the jury, Mammoth failed to again move for a directed verdict. It did, however, propose a jury instruction to direct a verdict in Mammoth's favor, which was refused by the district court. After instructions and arguments, the jury returned a verdict in favor of Bachtel for damages in the sum of $305,109.00 and in favor of his wife for loss of consortium in the sum of $50,000.00. In arriving at its verdict, the jury found that Bachtel was guilty of negligence to the extent of 25% and accordingly reduced the recoveries to $266,331.75. Mammoth then moved for a judgment notwithstanding the verdict pursuant to Rule 50 (b), FRCivP. Mammoth's assignments of error are grounded upon the denial of this motion.

ISSUES

I. Did the court err in denying appellant's motion for judgment notwithstanding the verdict?

II. Was Mammoth guilty of "negligence" as that word is used in 33 U.S.C. § 905 (b)?

III. Was one of the court's instructions erroneous as a matter of law?

IV. Did the court err in denying the Bachtels' motion to allocate attorney fees between themselves and the stevedore?

APPLICABLE STATUTORY LAW

In reviewing the issues before us, we must look to the Longshoremen's and Harbor Workers' Compensation Act,

33 U.S.C. §§ 901, *et seq.* [the Act]. Bachtel brought his action under the 1972 amendments to the Act; in particular, 33 U.S.C. § 905 (b). These amendments radically changed the law in this field. By virtue of these amendments, the longshoreman is entitled to increased workers' compensation benefits, but these benefits now constitute his sole remedy against the stevedore. However, the longshoreman has a cause of action against the vessel owner on a negligence theory, the former "unseaworthiness" brand of strict liability being abolished by the Act. Additionally, the shipowner, if liable, has no cause of action for indemnity against the stevedore.

If, under the provisions of the Act, the injured longshoreman fails to bring an action against the shipowner within six months, the stevedore or its compensation carrier, has the right to do so on his behalf. If the stevedore brings the action, the statute provides for the manner in which the recovery is to be distributed. 33 U.S.C. § 933 (e). The statute is silent as to distribution of proceeds when the longshoreman brings the suit, but it is clear that the stevedore has a lien against the longshoreman's recovery for the amount of benefits it has paid. The statute also does not define negligence. However, Congress clearly did not intend to use the word in its common law sense. We shall touch upon this subject later in the opinion.

I.

In the light of our conclusion that the evidence of Mammoth's negligence is substantial, if not overwhelming, we find no reason to examine in detail the merits of Mammoth's contention that the court erred in failing to grant its

motion for judgment notwithstanding the verdict. As to the Bachtels' contention that the procedural provisions of FRCivP 50 (b)[2] preclude our consideration of this issue, no doubt the district court considered Mammoth's motion for a directed verdict at the close of the plaintiff's case and in addition its request for an instruction requiring the jury to return a verdict in Mammoth's favor. These procedural steps placed the issue of the sufficiency of the evidence directly before the court. Consequently, the court had jurisdiction to pass on the sufficiency of the evidence under the Rule 50 (b) motion even though there was no motion for a directed verdict as required by the rule.

Although *Guerrero v. American-Hawaiian Steamship Co.*, 222 F.2d 238, 244 (CA9 1935), uses strong language in support of a strict enforcement of Rule 50 (b), what is there said must be viewed in the light of the fact that a summary judgment was involved and the judge, rather than a jury, decided the case.

Our view, as above expressed, is supported by *Oliveras v. American Export Isbrandtsen Lines, Inc.*, 431 F.2d 814, 817 (CA2 1970); *Jack Cole Co. v. Hudson*, 409 F.2d 188, 191 (CA5 1969) [requested instruction for a directed verdict is the equivalent of a motion for a directed verdict]; and 9 Wright & Miller 2539, P. 608. We decline to follow the

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[2] "(b) *Motion for Judgment Notwithstanding the Verdict.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; . . ."

demigogic approach expressed in *DeMarines v. KLM Royal Dutch Airlines,* 580 F.2d 1193 (CA3 1978), or *Martinez-Moll v. Levitt & Sons of Puerto Rico, Inc.,* 583 F.2d 565 (CA1 1978). Accordingly, we hold that the district court properly denied Mammoth's Rule 50 (b) motion on the ground that the evidence was sufficient to support the verdict.

II.

Before the 1972 amendments to the Act, the longshoremen could sue the shipowner for damages for personal injuries resulting from negligence or the unseaworthiness of the vessel. If the unseaworthiness resulted from a breach of the stevedore's implied warranty to perform its services in a safe and workmanlike manner, the shipowner would either implead the stevedore or, after judgment for the longshoreman, prosecute an action for indemnity against the stevedore. This triangular type of law suit resulted usually in the longshoreman receiving indirectly from the employer sums substantially more than the employer would have to pay the longshoreman by way of benefits under the then existing compensation act. Inasmuch as this circuity of litigation did violence to the statutory scheme then existing, the Congress passed the 1972 amendments. The main purpose of those amendments was to trade a rather substantial increase in compensation benefits to the longshoreman for his right to recover damages from the shipowner for personal injuries resulting from the unseaworthiness of the vessel. The longshoreman, however, retained a right to bring an action against the shipowner [Mammoth] for injuries resulting from the latter's *negligence.*

Due to Congress' failure to define "negligence" as it used that word in 33 U.S.C. § 905 (b) (the amendment which permits the longshoreman to recover against the shipowner), the law on the subject in our circuit,[3] and in others, was in a state of flux until the recent decision in *Santos v. Scindia Steam Navigation Co., Ltd.*, ... F.2d ..... (CA9 May 1, 1979) [Sl. Op. 1314]. *Santos* stated a standard of negligence to be applied in 33 U.S.C. § 905 (b) actions, as follows:

> "A vessel is subject to liability for injuries to longshoremen working on or near the vessel caused by conditions on the vessel if, but only if, the shipowner (a) knows of, or by the exercise of reasonable care would discover, the condition, and should realize that it involves an unreasonable risk of harm to such longshoremen, and
>
> (b) the shipowner fails to exercise reasonable care under the circumstances to protect the longshoremen against the danger." [Sl. Op. at 1320.]

The standard of negligence applied in *Santos* conforms to the standard on the same subject announced in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630-32 (1959). There, the Supreme Court refused to distinguish between licensees, trespassers and invitees and held that the one standard should be applied to all, that is "reasonable care under the circumstances of each case."

In the instructions to the jury, the district court defined negligence as follows:

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[3]*See Davison v. Pacific Inland Navigation Co., Inc.*, 569 F.2d 507 (CA9 1978); *Wescott v. Impresas Armadoras S.A. Panama* 564 F.2d 875 (CA9 1977); *Shellman v. United States Lines, Inc.* 528 F.2d 675 (CA9 1975), and numerous district court cases, including *Gallardo v. Westfal-Larsen & Co.*, 435 F.Supp. 484 (D. Or. 1977).

"Negligence is the failure to exercise ordinary care. It is the doing of some act which a reasonably careful person would not do under the same or similar circumstances or the failure to do something which a reasonably careful person would have done under the same or similar circumstances.

"Ordinary care is the care a reasonably prudent person would exercise under the same or similar circumstances.

"The term 'proximate cause' means a cause which in a direct sequence, unbroken by any new, independent cause, produces in whole or in part the injury complained of and without which that injury would not have happened. An injury may have more than one proximate cause."

Mammoth made no objection, nor took any exception, to this instruction on negligence as given by the court.

We now apply the standard of care outlined in *Santos* to the facts before us. In summary, the record shows that:

(1) Mammoth Fir was designed for no purpose other than a log carrier and that the steel stanchions provided by the vessel and used to secure the deck load were neither equipped with a device nor was there any procedure provided by which safety lines or nets could be attached to the stanchions.

(2) The failure to provide safety lines or nets to longshoremen lashing the log deck and working at the edge of the stack exposed longshoremen and, in particular, the appellee to a high risk of falling overboard and sustaining severe injuries.

(3) Mammoth had actual notice of the fact that the stevedore company could and would not rig safety lines or nets to protect longshoremen lashing the logs while working at the edge of the log deck and Mammoth knew that the stevedore would not provide such safety lines.

(4) Mammoth had actual knowledge of the fact that longshoremen were compelled to work near the edge of the logs in order to load and lash them and that walking or working near the edge of the logs created a high risk of slipping and falling off the edge the deck load.

(5) The lashing was done at the direction of Mammoth with participation by its crew using a method chosen by it and dictated by the vessel's design and equipment. Mammoth's design of the load of logs, in and of itself, created an extremely high risk of falling to persons, such as appellee, working at the top edge of the log deck while attempting to lash the logs.

The evidence before us and the inferences to be drawn therefrom fully support the above summarization. There is substantial evidence to support the jury's verdict that Mammoth was negligent under the *Santos* standard.

Consequently, we conclude that the district court properly denied appellant's motion for a directed verdict and we, likewise, conclude that it properly rejected the requested instruction for a verdict in appellant's favor as to negligence. The fact that the court's instruction does not fully conform to the standard oulined [sic] in *Santos* is of no consequence. Appellant did not complain of the instruction, but relied entirely on the insufficiency of the evidence to show negligence on its part. On this state of the record, the

nonconformance, if any, of the instruction with the *Santos* standard is completely harmless. Nor does the conceded negligence of the stevedore bar an action against Mammoth. The appellee may recover the full amount of his judgment against Mammoth, even though the stevedore was also negligent. This was settled in the recent case of *Edmonds v. Compagnie Generale Transatlantique,* ..... U.S. ..... (June 27, 1979) [Sl. Op. 1 at 6-7.]

III.

Finally, Mammoth alleges that the court erred in first reading to the jury Bachtel's contention that Mammoth failed to comply with the requirements of the Safety & Health Regulations for Longshoring, 29 C.F.R. §§ 1918.2 and 1918.32, and then instructing the jury that it could consider the regulations with other evidence. The latter section of the Code provides:

* * * * * *

> "(b) When an edge of a hatch section or of stowed cargo more than 8 feet high is so exposed that it presents a danger of an employee falling, the edge shall be guarded by a safety net or (sic) adequate strength to prevent injury to a falling employee, or by other means providing equal protection under the existing circumstances."

* * * * * *

Prior to the 1972 amendments to the Act, it was well settled that a violation of the then existing regulations was a subject which was properly presented to the jury. *Provenza v. American Export Lines, Inc.,* 324 F.2d 660 (CA4 1963). Although the *Provenza* court was principally

concerned with the doctrine of unseaworthiness, it also spoke to the issue of negligence. We quote:

> "It follows, of course, that if the jury should find that the stevedore had violated the regulations such conduct could also constitute negligence. *If in turn the negligent conduct of the stevedore were known, or by the exercise of reasonable care should have been known to the shipowner, and such negligence of the shipowner was a proximate cause of the plaintiff's injury, then he too would be liable to the plaintiff on the additional grounds of negligence.*" *Id.* at 665. [Emphasis supplied.]

In *Boleski v. American Export Lines, Inc.*, 385 F.2d 69 (CA4 1967), the Fourth Circuit approved the doctrine announced in *Provenza,* stating that the judge may properly instruct the jury that a violation of the safety and health regulations may be considered as evidence of negligence. The court held:

> "The Supreme Court denied certiorari in *Provenza* and this court has had no occasion to review it. It has been followed by the Second Circuit in Reid v. Quebec Paper Sales & Transportation Co., Ltd. 340 F.2d 34 (1965), and the Fifth Circuit in Marshall v. Isthmian Lines, Inc., 334 F.2d 131 (1964). Defendant has advanced no argument which disturbs or undermines the well-reasoned foundation of *Provenza* and we are not disposed to depart from its holding. *We find no error in the court's charge respecting the regulation.*" *Id.* at 74. [Emphasis supplied.]

The Fourth Circuit followed the same rule in *Venable v. A/S Det Forenede Dampskibsselskab,* 399 F.2d 347, 353 (CA4 1968).

However, since the enactment of the 1972 amendments eliminating the doctrine of unseaworthiness and restricting a longshoreman's recovery against the shipowner to negligence, the majority of the courts that have considered the regulations have limited their application to stevedores and held that they do not impose a duty on the shipowner. In the main, these cases arrive at their respective conclusions by holding that the provisions of 29 C.F.R. § 1918.2 expressly eliminate the shipowner from duties or obligations created by any one or more of the regulations. This section reads:

> "(a) The responsibilty for compliance with the regulations of this part is placed upon 'employers' as defined in § 1918.3(c).
>
> "(b) It is not the intent of the regulations of this part to place *additional responsibilities or duties on owners,* operators, agents or masters of vessels unless such persons are acting as employers, *nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom.*" [Emphasis supplied.]

Another proffered ground for the decisions of non-applicability of the regulations in the post-1972 period is that the cases such as *Provenza,* decided prior to the amendments, involved unseaworthiness, rather than negligence.

A casual reading of these authorities demonstrate that negligence *was* involved and emphasized in each one of the pre-1972 authorities. The post-1972 authorities speaking to this question entirely overlook the language of the mentioned section of the regulation which provides, in substance, that it *does not relieve owners, operators, agents*

or masters of vessels from responsibilities or duties now placed upon them by law, regulation, or custom. In fact, § 1918.2 has remained unaltered since the regulations were originally promulgated in 1960, pursuant to 33 U.S.C. § 941. The same is true of § 1918.32 (b) which was the basis for the district court's instruction in this case. Consequently, the specific language of § 1918.2, and the cases interpreting that section continue to bind the owner.

The post amendment cases are cited and briefly analyzed in *Chavis v. Finnlines, Ltd. O/Y,* 576 F.2d 1072, 1082 (CA4 1978). The *Chavis* court erroneously emphasized that *Provenza* dealt only with an unseaworthy condition when, in fact, the decision was also concerned with negligence. *Gay v. Ocean Transport & Trading, Ltd.,* 546 F.2d 1233 (CA5 1977), and *Brown v. Ivarans Rederi A/S,* 545 F.2d 854 (CA3 1976), cited in support of the conclusion that the regulation cannot be utilized by a longshoreman against the shipowner, rely on the same basic error and on the unwarranted interpretation of 29 C.F.R. § 1918.2.

Although § 1918.2 makes it clear that the regulations do not place *additional responsibilities or duties* on owners, operators, and others, it likewise makes it crystal clear that the regulations do not relieve the owners, operators, or masters from responsibilities or duties then placed upon them by law, regulations, or custom. The designing of a 20-30 foot deck load of logs without adequate safeguards at the sides could well have been viewed as evidence of negligence under the *law* as it existed prior to 1972. This design along with the failure to provide protective nets or other devices would be presented to a jury under the

customary definition of negligence. That is to say, the regulations here required nothing more than the due care required under the doctrine of negligence as it existed in maritime law prior to 1972.

We must assume that Congress was aware of the *Provenza, Bolenski* and *Venable* decisions, which held that the regulations applied to negligence on the part of the shipowner, at the time it passed the 1972 amendments. The negligence mentioned in 33 U.S.C. § 905 (b), therefore, would necessarily include a violation of the then existing law and regulations, including § 1918.32 (b), the subject of the court's instruction challenged by appellant. *See Shapiro v. United States,* 335 U.S. 1 (1948); *Allen v. Grand Central Aircraft Co.,* 347 U.S. 535 (1954).

Although neither the 1972 amendments, nor the regulations here mentioned, were involved in *Reyes v. Vantage S.S. Co., Inc.,* 558 F.2d 238 (CA5 1977), we suggest that the rule stated there is a proper one to be utilized in deciding whether the regulations under scrutiny should be here applied. In *Reyes,* the court held that where a statute was intended to protect the class of people to which a plaintiff belongs against risk of the type of harm which has in fact occurred, violation of such statute is negligence in itself. The court went on to say that inherent in the statement of the legal principle were three questions which should be resolved before liability could be imposed on a negligence theory: (1) was there a violation of the regulations; (2) were the regulations designed to protect the plaintiff; and (3) were they intended to protect against the risk of

the kind of harm that occurred? *Id.* at 242. Here, the evidence supplies all three elements beyond question.

In general, the regulations, which were promulgated under 33 U.S.C. § 941, were intended to eliminate the risk of injury to all longshoremen and not just to those who exercise prudence. *Denny v. Jugoslavenska Oceanska Plov,* 455 F.2d 1277, 1278 (CA5 1972). The regulations might prove helpful in suggesting types of measures deemed necessary for maintenance of a safe ship. *Darwin v. United States,* 435 F. Supp. 501, 507 (ND Cal. 1977), and are binding on the shipowner where he knew or should have known of a violation of the safety regulations. *Anuszewski v. Dynamic Mariners Corp. Panama,* 391 F. Supp. 1143, 1145 (D. Md. 1975), *aff'd.* 540 F.2d 757 (CA4 1976).

Here, the trial judge did not instruct that Mammoth was negligent as a matter of law in failing to comply with the regulation. He submitted the regulation to the jury, along with all other evidence, so that the members might determine whether Mammoth was guilty of negligence. This would be the proper course to follow under all of the pre-1972 cases on the subject. We observe no real distinction between the requirements of a statute as mentioned in *Reyes,* and the requirements of the regulation presented to the jury by the district court. The court properly presented the regulation for the jury's consideration.

IV.

As previously mentioned, the stevedore intervened in these proceedings to assert its lien on the Bachtels' recovery for the amount of compensation it had paid pursuant to 33 U.S.C. § 933. Its claim of lien approximates

$33,000.00. The Bachtels recognized the validity of the lien, but claimed that the efforts of their attorney were responsible for recovering the fund on which the lien was claimed and, consequently, the stevedore should contribute its proportionate share of the attorney fees and costs.

The district court rejected the Bachtels' claim and adopted what is commonly known as the "Fund" rule under which the attorney fees come off the top of the recovery, then the lien is paid in full and the injured party receives the residue. This theory received support in *Cella v. Partenreederei MS Ravenna,* 529 F.2d 15 (CA1 1975), *cert. denied* 425 U.S. 975 (1976). The "Fund" rule was first announced in *Fontana v. Pennsylvania R. Co.,* 106 F. Supp. 461 (SD NY 1952), *aff'd. mem. sub nom Fontana v. Graceline, Inc.,* 205 F.2d 151 (CA2 1953), *cert. denied* 346 U.S. 886. This approach was enforced in *Valentino v. Rickners Rhederei G.M.B.H., etc.,* 552 F.2d 466 (CA2 1977), in which the Second Circuit reversed the district judge's adoption of a "pro-rata" approach in his opinion, 417 F. Supp. 176 (ED NY 1976). This type of distribution appears to follow the scheme which is set up in the statute with reference to recoveries obtained by the stevedore under 33 U.S.C. § 933 (e).

The "Fund" approach, in our view, places an unconscionable burden upon the injured person. For example, there are probably many cases where the recovery might exceed the stevedore's lien by a minimal amount. In such case, the stevedore would get the full benefit of the services of plaintiff's attorneys, yet contribute nothing, time or money, to the recovery.

The equitable approach, in our view, is that adopted in *Swift v. Bolten,* 517 F.2d 368 (CA4 1975). There, the district court held that the stevedore's lien took priority over the attorney fees. The Fourth Circuit, in reversing, adopted the "pro-rata" approach. Relying on settled equitable principles stated in *Vaughan v. Atkinson,* 369 U.S. 527 (1962), *rehearing denied* 370 U.S. 965; *Sheris v. Travelers Ins. Co.,* 491 F.2d 603 (CA4 1974), *cert. denied* 419 U.S. 831, and on the fact that the conflicts of interest between the longshoreman and the stevedore were eliminated by the amendments of 1972, the court held that where the stevedore's pecuniary advantage was secured through the services of counsel employed by the longshoreman, the stevedore should be taxed with a proportionate share of the reasonable fee of the longshoreman's counsel.

In rejecting the fund approach stated in *Valentino,* the Fifth Circuit in *Mitchell v. Scheepvaart Maatschappij TransOcean,* 579 F.2d 1274 (CA5 1978), said: ". . . This measured, arithmetic ranking cannot be defended on equitable principles unless we view the longshoreman as the only party who is, for some reason, not entitled to the Chancellor's consideration." *Id.* at 1279. In rejecting the "Fund" or statutory approach, the *Mitchell* court noted that not only is the statute silent on the subject, but that the equitable lien itself is a judicial creation. *See Allen v. Texaco, Inc.,* 510 F.2d 977, 979-980 (CA5 1975). Additionally, the *Mitchell* court declined to follow the *Cella* court's determination and stated that the purpose of the 1972 amendments was to increase the amount of money available for compensation purposes. *Mitchell* also held that the ends of justice were better served by encouraging third party

suits by the longshoremen. In criticism of *Cella, Mitchell* stated that its holding would discourage suits by longshoremen because they would be unwilling to sue unless they could be rather certain of recovering an amount substantially in excess of the lien. After further analysis, *Mitchell* went on to recognize that while the pro-rata approach stated in *Swift* might be appropriate in many cases, it would not adopt it as a hard and fast rule. It suggested in some cases the recovery might be large enough so that the entire attorney fee should be paid by the injured person. The *Mitchell* court concluded by suggesting a "balancing" approach which would consider the reasonableness of the fees, the services rendered, and the equities involved.

The Ninth Circuit has not spoken upon the problem. Upon reflection we forecast nothing but trouble and confusion in attempting to apply the *Mitchell* "balancing" formula. The guidelines are so vague that an appeal could be expected in a substantial number of the cases. The "Fund" approach stated in *Cella, Fontana,* and *Valentino* is unfair and in many instances would work a devastating hardship on the injured person. The *Swift* "pro-rata" formula is easy to apply and is completely in line with equitable principles as well as Congress' intent in adopting the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act. On this record, we adopt the *Swift* "pro-rata" rule as the law to be applied in the Ninth Circuit. This disposition is in line with Judge Solomon's able opinion in *Brown v. American Mail Line, Ltd.*, 437 F. Supp. 628 (D. Or. 1977).

We leave to another day a decision on the proper rule to be applied where the longshoreman recovers a judgment no greater than the lien of the stevedore-employer.

CONCLUSION

The judgment is affirmed except as to the application of the award of attorney fees. With reference to the attorney fees, the cause is remanded to the district court for application of the "pro-rata" formula adopted in *Swift v. Bolten, supra.*

AFFIRMED AS MODIFIED.

Appendix A

(photograph omitted)